

<sup>1</sup> Claimant had raised an issue regarding the compensation rate used in the Award, however, the parties agreed at oral argument that the rate is no longer in dispute.

Respondent argues the ALJ's Award should be affirmed.

The sole issue for the Board's review is: what is the nature and extent of claimant's disability?

### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant worked for respondent as a custodial specialist in housekeeping at the Kansas Neurological Institute (KNI). As of claimant's last day of work for respondent, on May 17, 2012, she had worked at KNI for 19 years. Claimant described her October 18, 2010, accident as follows:

I was going up some stairs and I fell on a towel that was sticking up and I fell on my shoulder and I hurt it pretty bad, so after that, I went home.<sup>2</sup>

Claimant testified she injured her left shoulder, left arm and left hand at the time of the accident. Her neck started hurting approximately two days after the accident. Claimant was initially treated by Dr. Donald Mead, an occupational medicine physician, who had x-rays taken and prescribed conservative treatment. A left shoulder MRI scan was conducted which revealed evidence of a full-thickness tear of the left supraspinatus tendon with retraction.

Claimant was referred to an orthopedic specialist, Dr. Brett Wallace. On May 4, 2011, Dr. Wallace performed surgery, consisting of left subacromial decompression, excision of the lateral clavicle and rotator cuff repair. Dr. Wallace provided post-operative care. Dr. Wallace treated only claimant's left shoulder even though claimant testified she was having problems with her neck, left arm, left hand and fingers.

On August 31, 2011, Dr. Wallace recommended additional physical therapy, but indicated "I do not think return [to see Dr. Wallace] is needed."<sup>3</sup> Dr. Wallace imposed restrictions of light medium work for one month, with no lifting more than 10 pounds overhead. On October 1, 2011, claimant was released to return to her normal job duties.

The first documentation of claimant's cervical complaints was in Dr. Wallace's chart entry dated January 27, 2012.<sup>4</sup>

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<sup>2</sup> R.H. Trans. at 7.

<sup>3</sup> Poppa Depo., Ex. 9 at 1.

<sup>4</sup> *Id.*, Ex. 8 at 1.

Claimant self-treated her neck symptoms with a TENS unit and Voltaren ointment which had been prescribed for the treatment of a low back injury. The low back injury apparently occurred on May 12, 2012. Other than the self-treatment, claimant did not receive any medical treatment for her neck.

Claimant applied for social security disability benefits in June 2012. She has been approved and is now receiving a monthly benefit of \$1,017.

At the request of claimant's counsel, Dr. Michael Poppa performed a medical evaluation on May 4, 2012. The doctor reviewed claimant's medical records, took a history and also performed a physical examination. Dr. Poppa testified:

A. Ms. Turner indicated that as a result of her work injury dated 10/18/10 while employed by Kansas Neurological Institute, she sustained an injury, primary injury, to her left upper extremity and shoulder and, as a result or part of that, developed cervical condition pain.

Q. Neck pain?

A. Yes.

Q. Now, did the neck pain present itself immediately after the fall at work, or did that come on later?

A. It did not present itself initially, but oftentimes what occurs with a serious shoulder injury, whether it's right or left shoulder, is guarding, muscle spasm, pain, myofascial-type pain, and individuals don't -- maybe block it out or don't pay much attention to it because of the primary shoulder dysfunction. So it did occur as she continued to get better on her shoulder.<sup>5</sup>

Dr. Poppa diagnosed:

1) a traumatic contusion and strain of the left shoulder, with complete tear of the supraspinatus tendon with moderate retraction;

2) a left shoulder labral tear;

3) left shoulder acromioclavicular joint pain; and

4) chronic musculoligamentous sprain/strain of the cervical spine, with chronic myofascitis and cervicgia.

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<sup>5</sup> *Id.* at 6-7.

Dr. Poppa opined that claimant's left shoulder and neck injuries were consequences of claimant's accident. Dr. Poppa found claimant had reached maximum medical improvement and imposed permanent restrictions of limited repetitive overhead use of the left shoulder.

Based upon the AMA *Guides*<sup>6</sup>, Dr. Poppa found claimant sustained a 19% permanent functional impairment to the left shoulder, which converted to an 11% whole body impairment. Dr. Poppa rated claimant's cervical spine at 5% to the whole body. Using the AMA *Guide's* combined values chart, the whole body impairments combined to a 15% whole person functional impairment. Dr. Poppa reviewed a list of work tasks<sup>7</sup> performed by claimant in the 15 years preceding the accidental injury and opined claimant could no longer perform 12 of the 15 tasks for an 80% task loss.

Dr. Poppa testified:

Q. And I'm sorry, to be more specific, what was the physical change in the structure of the neck?

A. Right. Her physical examination revealed chronic myofascitis with spasm and indurated tender points. The spasm and indurated tender points are not normal, normally present, and do represent an alteration or a change in the physical structure of the soft tissue as well as the cervical paraspinous muscles.

Q. I'm asking about the neck and not the paraspinous muscles.

A. I'm sorry, cervical paraspinous muscles.<sup>8</sup>

. . . . .

Q. Well, your report on page 4 under [c]onclusions says that her injury occurred on October 18th of 2010. Is today the first time you've expressed the opinion that any injury occurred post surgery?

A. No. I previously stated earlier in the deposition, a couple of hours ago, that Ms. Turner -- it is not unusual for an individual to sustain a neck condition as a result of a traumatic and severe shoulder injury where she slipped and fell, and that maybe

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<sup>6</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

<sup>7</sup> The task list reviewed by Drs. Poppa and Prostic was prepared by Dr. Robert W. Barnett, a vocational counselor and psychologist. Dr. Barnett did not testify, but both parties offered Mr. Barnett's task list into evidence.

<sup>8</sup> Poppa Depo. at 37-38.

it did not become as noticeable until after her shoulder became more quiescent or less troublesome.

Q. But you don't really know when the neck became symptomatic, or do you really care?

A. No, I do care. I think it's important that there is documentation of neck pain and complaints and that I don't know specifically when it occurred, but I am of the opinion that because of the severity of her shoulder injury and subsequent surgery, as that improved, her neck and [sic] area which was not treated continued to bother her.<sup>9</sup>

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on August 13, 2012, at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Prostic diagnosed claimant with status post excision of the left lateral clavicle and left rotator cuff repair.

Dr. Prostic opined that claimant's neck difficulties were unrelated to her work accident. The doctor testified:

A. She had had [sic] considerable treatment without any of the doctors mentioning a problem with her neck, so it was my belief that any neck difficulties that she had occurred subsequent to the work accident and were unrelated to it.

Q. Did you make a finding whether or not she had any neck problems at all which were related or unrelated to her employment?

A. I tried to concentrate only on whether or not they would be concerned with this accident, so I did not dictate notes about her neck and for that reason don't have good recall of her neck exam.<sup>10</sup>

Based upon the *AMA Guides*, Dr. Prostic found claimant sustained a 16% functional impairment to her left shoulder due to the excision of the lateral clavicle, loss of range of motion and loss of strength.

Dr. Prostic expressed no opinion regarding claimant's task loss in connection with claimant's accidental injury. Instead, Dr. Prostic applied restrictions imposed by Dr. Michael Smith, an orthopedic surgeon and associate of Dr. Wallace, to the task list. Dr.

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<sup>9</sup> *Id.* at 45-46.

<sup>10</sup> Prostic Depo. at 5.

Smith's restrictions were dated December 4, 2007.<sup>11</sup> There is no indication in the record that Dr. Smith's restrictions relate to claimant's neck or left shoulder. In applying Dr. Smith's restrictions, Dr. Prostic concluded claimant was not able to perform 12 of the 15 tasks, resulting in an 80% task loss.<sup>12</sup> The record is unclear what relevance Dr. Prostic's task loss opinion based on another physician's 2007 restrictions could have to this claim.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>13</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>14</sup>

In determining whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers compensation benefits available.<sup>15</sup>

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled

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<sup>11</sup> Poppa Depo., Ex. 6 at 1; Prostic Depo., Ex. 2 at 1.

<sup>12</sup> Neither Dr. Smith nor Dr. Wallace testified.

<sup>13</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>14</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>15</sup> *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

part of the body and permanent partial general disability.<sup>16</sup> “When a specific injury and disability is a scheduled injury under the Workmen’s Compensation Act, the benefits provided under the schedule are exclusive of any other compensation.”<sup>17</sup>

The Board adopts the ALJ’s findings of fact to the extent they are consistent with the findings above.

The Board also adopts, and incorporates herein by reference, the ALJ’s conclusions of law. Specifically, claimant sustained a scheduled injury to the left shoulder as a consequence of the compensable accident of October 18, 2010. In addition to the temporary total disability benefits and medical expenses already paid by respondent, claimant is entitled to permanent partial disability benefits based on a 16% permanent impairment to the left shoulder.

The preponderance of the evidence does not establish claimant sustained permanent injury or permanent impairment of function to her cervical spine that was caused, contributed to or aggravated by claimant’s accident. Other than the use of ointment and a TENS unit evidently prescribed in connection with another injury, claimant received no medical treatment for her neck. There is no indication in the record that claimant sought neck treatment pursuant to the Act’s preliminary hearing procedure.<sup>18</sup> The evidence proves that there was no documentation of claimant’s cervical spine complaints until claimant returned to see Dr. Wallace on January 27, 2012, well over a year after the accident. It is improbable that claimant sustained permanent injury or permanent impairment to her neck but sought no treatment for the neck from a health care provider.

Dr. Prostic testified that claimant’s neck complaints arose after the accident and are unrelated to it. Under the circumstances of this claim, Dr. Prostic’s opinion regarding causation of claimant’s neck complaints is more persuasive and credible than Dr. Poppa’s opinion.

#### **CONCLUSIONS OF LAW**

Claimant is entitled to permanent partial disability benefits based on a 16% permanent impairment to the left shoulder. Claimant did not prove permanent injury or impairment to her cervical spine.

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<sup>16</sup> See K.S.A. 44-510d; K.S.A. 44-510e.

<sup>17</sup> K.S.A. 2010 Supp. 44-510d(b).

<sup>18</sup> K.S.A. 2010 Supp. 44-534a.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>19</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the Board's decision that the Award of ALJ Rebecca A. Sanders dated January 28, 2013, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Rebecca A. Sanders, Administrative Law Judge

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<sup>19</sup> K.S.A. 2010 Supp. 44-555c(k).